BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal'of)
)
ROBERT R. RAMLOSE)

Appearances:

For Appellant: Robert R. Ramlose, in pro. per.

For Respondent: John D. Schell
Counsel

O P I N I O N

This appeal'is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Robert R. Ramlose against a proposed assessment of additional personal income tax and penalties in the total amount of $3,665.02 for the year 1961. Respondent now concedes that the assessment should be reduced to $84.02 in tax and $46.25 in penalties.' Appellant has expressed his acquiescence in the proposed revision of tax but seeks the elimination of all penalties and interest.

The principal question remaining for decision is whether penalties for failure to file a timely return, for failure to file a return after notice and demand, and for negligence, should be imposed.

In 1961 appeliant was the majority stockholder of a corporation operating a camera shop. He filed no California personal income tax return for that year. Based upon a federal audit report indicating that appellant had taxable income in 1961 in excess of $40,000 and a federal tax liability of $21,114.55, respondent., on October 29, 1964, requested appellant to file a 1961 state income tax return. When-there was no response, respondent, on May 12, 1965, issued a written notice

and demand to file such a return. Appellant did not respond to this notice or to subsequent letters from respondent. On May 31, 1968, a notice of proposed assessment of tax and penalties based on the federal report was issued by respondent.

Appellant filed a protest against the deficiency assessment and enclosed a copy of a stipulated decision of the U.S. Tax Court in which appellant and the federal Internal Revenue Service agreed there was federal income tax due in the substantially lesser amount of $1,568.34. No information was submitted with respect to the nature of the federal adjustments. Appellant and the Service also agreed to the imposition of penalties for failure to file timely returns, negligence, and failure to pay estimated tax. (Int. Rev. Code of 1954, §§6651(a), 6653(a), and 6654(a).) Respondent denied the protest on March 21, 1969, after appellant had failed to respond to requests for information concerning the particulars of the federal adjustments.

Appellant filed an appeal with this board on April 20, 1969, and stated therein that he did not have copies of the corrected federal audit but merely had copies of the stipulation. Thereafter, based on the federal stipulated decision, respondent calculated, for state income tax purposes, that appellant's adjusted gross income was $7,300.60, and his taxable income was $5,300.60, with a resulting tax liability of $84.02. Respondent added to this amount two penalties each in the amount of 25 percent of the revised tax; one for failure to file and one for failure to file on notice and demand ($21.00 each), together with a 5 percent penalty for negligence (totaling $4.25), plus applicable interest. In response to respondent's offer to settle the appeal on the basis of the revised calculations of tax and penalties, appellant stated that he had no argument with the revised tax but questioned the penalties and interest,

Appellant contends that at the time for filing a 1961 return he reasonably concluded filing was not required. He admits, however, that he did not have professional advice in coming to this conclusion.

A deficiency assessment issued by respondent on the basis of a federal audit report is presumptively correct and the burden is on the taxpayer to show that it is erroneous. (Todd v. McColgan, 89 Cal. App. 2d 509 [201 P.2d 414].) This rule also applies to penalty

determinations. (Boynton v. Pedrick, 228 F.2d 745, cert. denied, 351 U.S. 910 [100 L.Ed. 445]; Appeal of Myron E. and Alice Z. Gire., Cal. St. Bd. of Equal., Sept. 10, 1969.)

In 1961 individuals having a gross income of $5,000 or more were required to file a return with respondent regardless of the amount of their net income and regardless of the amount of their deductions. (Former requirement of Rev. & Tax. Code, § 18401.) Furthermore, in 1961 married persons having a net income of $3,000 or more were required to file a return. For single persons the amount was $1,500.

In the instant matter, appellant agreed to a federal tax liability which indicated that his gross income for state tax purposes was $7,300.60 and agreed that similar federal penalty provisions for failure to file and negligence were applicable. This indicates that a return was required. Furthermore,, appellant has obviously not met the burden of proving the contrary. It is true that, where failure to file is due to reasonable cause and not due to willful neglect, a penalty for that failure is not warranted. (Rev. & Tax. Code, § 18681.) However, in the absence of evidence showing reliance on the advice of competent counsel, mere mistaken belief that no return was required under the statute does not constitute reasonable cause for noncompliance with a filing requirement. (Genevra Heman, 32 T.C. 479, 490.) This is true irrespective of the sincerity of the belief. (Appeal of J. Morris & Leila G. Forbes, Cal, St. Bd. of Equal., Aug. 7, 1967.) Appellant has in no way excused his failure to file a return upon notice and demand by respondent and the penalty imposed under section 18682 of the Revenue and Taxation Code was properly imposed.

With respect to the negligence penalty, it is noted that appellant agreed to a revised federal assessment which included a comparable negligence penalty. (Cf. Appeal of Harrs & Tessie Somers, Cal. St. Bd. of Equal., March 25, 1968.) Furthermore, it is entirely proper to impose penalties both for negligence and failure to file. (Vahram Chimchirian, 42 B.T.A. 1437, aff'd per curiam, 125 F.2d 746; Robinson's Dairy Inc., 35 T.C. 601.) In addition, no evidence has been presented which would satisfy appellant's burden of proving the absence of negligence.

The running of interest could also have been avoided by a timely tax payment. Furthermore, in view

of the mandatory nature of the assessment of interest it may not be deleted merely because of a delay in the determination of tax liability. (Appeal of Ruth Wertheim Smith, Cal. St. Bd. of Equal., Aug. 3, 1965.)

ORDER

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Robert R. Ramlose against a proposed assessment of additional personal income tax and penalties in the total amount of $3,665.02 for the year 1961, be and the same is hereby modified in accordance with respondent's concessions. In all other respectsthe action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 7th day of December, 1970, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____, Secretary